93-959

Supreme Court, U.S.
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

CLAY GERGICK,

Petitioner,

vs.

RICHARD AUSTIN, Acting Administrator, of the GENERAL SERVICES ADMINISTRATION, United States of America

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petition for a Writ of Certiorari

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65 pp

QUESTION PRESENTED

DOES THE FEDERAL TORT CLAIMS ACT PROVIDE PETITIONER A REMEDY FOR DAMAGES NOT PROVIDED FOR BY THE WHISTLEBLOWER PROTECTION ACT OF 1989?

PARTIES TO THE PROCEEDINGS

The parties below were Clarence Gergick, plaintiff below and petitioner herein; and Richard Austin, Acting Administrator for the General Services Administration, defendant and respondent herein.

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NO._____

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petition for a Writ of Certiorari

Petitioner Clay Gergick hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of

Appeals for the Eighth Circuit.

OPINIONS BELOW

The District Court's Opinion of April 29, 1992 granting the General Service Administration's Motion for Summary Judgment on Petitioner's Federal Tort Claim is set out at C1 to C26; the Order of the Eighth Circuit Court of Appeals dated July 9, 1993 affirming the District Court's grant of summary judgment is set out B1 to B8; the order of the Eighth Circuit Court of Appeals denying Petitioner's Request for Rehearing and Suggestion for Rehearing en Banc dated August 13, 1993 is set out at A1.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1993. A timely Petition for Rehearing was filed, which was denied on August 13, 1993. On November 2, 1993 Justice Blackmun entered an order

extending the due date for the Petition for A Writ of Certiorari to and including December 13, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTE, RULE AND CONSTITUTIONAL PROVISIONS INVOLVED

5 U.S.C. Sec. 1222 (Supp. 1990) (The Whistleblower Protection Act) provides in part:

> Sec. 1222. Availability of other remedies.
>
> Except as provided in Section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23.

STATEMENT OF THE CASE

a. Course of Proceedings

Petitioner filed his initial claim in the United States District Court for the Western District of Missouri in October of 1989 against the official representative of

the General Services Administration (GSA) in one count for retaliation consisting of adverse personnel actions and harassment pursuant to 42 U.S.C. Sec. 2000e-16 et seq (Title VII); it was subsequently amended to add Counts II, III and IV. Count II pled an additional count of retaliation alleging additional adverse personnel actions and harassment pursuant to 42 U.S.C. Sec. 2000e-16; Count III violations of 5 U.S.C. Sec. 552a (The Privacy Act of 1974) and Count IV sought recompense for the emotional distress Petitioner had suffered as a result of his "whistleblowing" and "EEO" activities pursuant to 28 U.S.C. 1346(b), 2672 and 2679 (the Federal Tort Claims Act as amended 1988, hereinafter referred to as the "FTCA"). After the passage of the 1991 Civil Rights Act, Petitioner moved for amendment to bring Counts I and II under

that Act on a theory of retroactivity. This was denied by the District Court, affirmed on appeal and is presently the subject of an Application for Stay pending this Court's decision in Landgraf v. USI Film Industries, No. 92-757, argued October 13 before this Court.[1]

While pursuing his District Court claims, petitioner also sought relief under the Whistleblower Protection Act of 1989 (WPA). The facts upon which he sought redress in the District Court under Title VII and the facts upon which he sought redress before the MSPB for his WPA claims

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1 A request for stay by the District Court pending resolution of the matter by this Court was denied. This was also requested of the Eighth Circuit and it was denied.

were very similar.[2] The reason for the dual claims was twofold: first, it was unclear given the facts whether the reprisals consisting of adverse personnel actions and harassment were taken as a result of Petitioner's "whistleblowing" as defined by the WPA, or as a result of his protected "EEO activity" or a combination of both; and second, at the time the WPA claims were brought shortly after the WPA enactment in July of 1989 it was not known whether EEO retaliation claims were subject to redress under the WPA as well as under Title VII.[3]

Petitioner therefore also sought relief for the adverse personnel actions and

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2 The defense to both the Title VII claims and the WPA claims was in fact identical by the government.

3 See Williams v. Department of Defense, 46 M.S.P.R. 549 (1991) and Williams v. Department of Defense, 47 M.S.P.R. 561, 463 (1991).

harassment he was suffering in two successive claims under the WPA before the Merit System Protection Board (MSPB). The first claim went to the full Board in Washington on jurisdictional issues while the second claim proceeded to conclusion in Petitioner's favor on June 7, 1990.[4] Thereafter the first claim was remanded and was decided in Petitioner's favor on December 4, 1991.[5] Neither matter was appealed by GSA and both became final within 30 days of the date of the "Initial

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4 Clarence B. Gergick, Appellant v. General Services Administration, Agency; Docket No. SL122190W0155, United States of America Merit Systems Protection Board, St. Louis Regional Office.

5 Clarence B. Gergick, Appellant, v. General Services Administration, Agency, Docket No. SL1221900030B1, United States of America Merit Systems Protection Board, St. Louis Regional Office.

Decisions" referenced.[6]

During discovery in the District Court case, GSA filed a Motion to Dismiss Gergick's FTCA claim on the ground that worker's compensation was the exclusive remedy for his claims of emotional distress. Judge Sachs[7] denied the motion.

After the close of discovery GSA filed a Motion for Summary Judgment on Petitioner's FTCA claim on the grounds that the Civil Service Reform Act (CSRA) (and consequently the WPA) was the exclusive remedy for his "whistleblowing" claims and

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6 Neither of the decisions referenced above are replicated in the appendix as they are extremely lengthy. If the Court desires copies of these decisions, Petitioner will provide a separate appendix with these two decisions.

7 Judge Sachs was the initial judge assigned to the case. The case was given to Judge Gaitan upon his being elevated to the bench of the District Court.

therefore he could seek no further damages under the FTCA. The District Court on April 29, 1992 granted GSA's Motion.[8]

Counts I, II and part of Count III were tried to the Court May 5 through 7, 1992. The District Court on August 24, 1992 adopted the Proposed Findings of Fact and Conclusions of Law proffered by GSA. These "Findings of Fact" were not only adverse to Petitioner but in direct contravention to most if not all of the "Findings of Fact" made by the Administrative Law Judge for the MSPB in Petitioner's two WPA claims, including the "findings of fact and conclusions of law" on the defenses offered by the government, which were identical in both jurisdictions. Judgement was thereafter entered for the defendant on all of Petitioner's claims.

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[8] See Appendix at C1 through C26.

An amended Judgment was entered August 26, 1992 to include reference to the previous grant and denials of summary judgment on April 29, 1992 and amendment of the pleadings. Petitioner filed a timely notice of appeal September 21, 1992. The case proceeded on appeal.

On July 9, 1993[9] the Eighth Circuit affirmed the District Court's grant of Summary Judgment as well as its Findings of Fact and Conclusions of Law. A timely Petition for Rehearing and Suggestions for Hearing En Banc was filed but was denied August 13, 1993. Thereafter, Petitioner timely filed a Request for an Extension of Time to file Petition for a Writ of Certiorari. Said request was granted in part on November 2, 1993 by Justice Blackmun extending the time to file this Petition

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9 See Appendix B.

until December 13, 1993.

Additionally, Petitioner has filed a request for Stay of the Eighth Circuit's Mandate with regard to the entry of judgment on Petitioner's Title VII claims in Counts I and II of his First Amended Complaint pending resolution by this Court of Landgraf v. USI Film Industries, No. 92-757, argued October 13, 1993 before this Court. Petitioner in his stay requests this Court vacate the Findings of Fact and Conclusions of Law entered by the District Court and affirmed by the Eighth Circuit and remand the case for trial by jury if this Court finds the 1991 Civil Rights Act to be retroactive.

The sole issue presented to this Court is whether the Federal Tort Claim Act provides a remedy to Petitioner for the emotional distress and other loses he

suffered which were not compensable by the remedial provisions of the WPA for his "whistleblowing" activities.

b. Statement of Facts

On February 15, 1990 Petitioner timely sought corrective action from the MSPB under 5 U.S.C. Sec. 1221(a) (the WPA) of various matters including the giving of a "fully successful" performance rating dated September 8, 1989 and a detail from his position of Supervisory Financial Analyst, GM-13, Credit and Finance Section, Accounts Receivable Branch, Finance Division, Office of Administration, Region 6, Kansas City, Missouri, General Services Administration to a position in the same Branch but with unclassified duties, effective October 16, 1989. The MSPB took jurisdiction of the matter and discovery proceeded. After the close of discovery, a three day hearing was

heard on the record before the Administrative Law Judge in which not only extensive exhibits were received from both Petitioner but from the Government; and live testimony was taken providing opportunity for cross examination by the parties. The ALJ thereafter found on June 7, 1991 that the Petitioner demonstrated that his protected whistleblowing activity[10] was a contributing factor in the agency's decisions to place him on detail and to rate

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Petitioner's "whistleblowing" consisted of reports to Senators about abuse of the "cash" awards program; criticism of the handling of cash deposits resulting in loss of interest for the government on the agency's bank accounts; an irregular out of office business relationship between one of the agency's directors (Gary Schroeder) and his subordinates; as well as apparent violations of law concerning contractors attempts to obtain government leases. Most of these were reported to the OSC, IG as well as the FBI. The FBI testified that it actually investigated several of the complaints.

his performance only at the fully successful level;[11] that it was a contributing factor in his detail and rating; and that the agency failed to show that it would have taken the same actions against him in the absence of his protected conduct. The ALJ thereafter ordered the recision not only of the October 16, 1989 detail but the details that had commenced in March of 1989 as well as the expungement of the September 14, 1989 "fully successful performance rating" and its replacement with a "highly successful" rating. Attorney fees were also submitted and subject to an agreement with the government thereafter. No award however was made for emotional distress or other damages in terms of items not covered by the remedial provisions of the WPA.

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11 His "whistleblowing" consisted in part of protected "eeo" activity.

On October 2, 1989 the appellant had timely sought corrective action from the MSPB regarding a "Record of Inquiry" issued to him on August 4, 1989. Petitioner claimed that the "Record of Inquiry" constituted a "threatened personnel action" within the meaning of the WPA in reprisal for his making protected disclosures as defined in 5 U.S.C. Sec. 2302(b)(8). This case went to the full Board in Washington on the issue whether the "Record of Inquiry" constituted a "threatened personnel action".[12] The full Board so found. However, before the matter was remanded for further processing, Petitioner's second WPA claim was heard by the ALJ and determined by him. Upon remand of the first WPA claim, the parties agreed to submit the claim on

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12 See Gergick v. General Services Administration, 43 M.S.P.R. 651 (1990).

the basis of the record obtained in the first hearing. The government submitted no further evidence.

On December 4, 1991 the ALJ found that again the appellant had engaged in protected whistleblowing activities and that his protected disclosures constituted a contributing factor in the agency's issuance of the August 4, 1989 Record of Inquiry (RI). And, as in the June 7, 1991 ruling, the ALJ also found that the agency failed to show that it would have taken the same action against Petitioner in the absence of his protected conduct. The ALJ then ordered cancellation of the RI and expungement of it from the Petitioner's Official Personnel Folder (OPF) and from any other files which GSA may have on Petitioner. Certain other documents related to the RI were also ordered expunged. Again, no damages for

emotional distress were ordered, but attorneys fees were granted.

Both of these decisions became final by the failure of GSA to seek an appeal within 30 days of the entering of the "Initial Decisions".

In his FTCA claim in the District Court the Petitioner sought redress for the emotional distress which he suffered as a result of being reprised against for his "whistleblowing" activities. He proffered an expert psychologist to substantiate his claims and was subjected to a "mental examination" by the government. He also sought redress for those out of pocket expenses not covered by the WPA remedial provisions.

Initially, the government's position was that plaintiff could seek redress for the emotional distress he suffered

exclusively through the government's worker's compensation laws. This was rejected by the District Court. The government subsequently filed its Motion for Partial Summary Judgment claiming that the WPA was the exclusive remedy for Petitioner's whistleblowing claims, and if the WPA did not provide a remedy for his emotional distress and other out-of-pocket expenses, then he was precluded from seeking recompense for those damages under any other statute, including the FTCA. The District Court granted that motion, which was affirmed on appeal. This Petition for a Writ follows.

REASONS FOR GRANTING THE WRIT

Petitioner claims the District Court erred in granting Summary Judgment to GSA on Petitioner's FTCA claim because the CSRA (and WPA) does not provide the EXCLUSIVE

remedy to Petitioner for his losses resulting from reprisal for his whistleblowing. The CSRA was clearly meant to deal with merit decisions on personnel actions such as promotions, reprimands, demotions and firings. United States v. Fausto, 484 U.S. 439 (1988). Neither Fausto nor any other decision has addressed the issue of who decides collateral issues such as emotional distress claimed as a result of personnel actions. GSA and the District Court's reliance on Rivera v. United States, 924 F.2d 949 (9th Cir. 1991) is misplaced. In Rivera the plaintiff sought to bring his claims under the FTCA as opposed to the CSRA MSPB forum. That is not the case here. Petitioner brought his claims before the MSPB but that forum did not provide complete relief.

Petitioner seeks redress for the

"emotional distress" he suffered or other out of pocket expenses which are not covered by the WPA. He contends that 5 U.S.C. Sec. 1222 (Supp. 1990) provides that his remedies shall not be limited outside of the WPA, clearly implying that he has other remed(ies) and that the WPA is not his exclusive remedy.

Initially, respondent seemed to agree with Petitioner that he did have a forum to proceed with his emotional distress claims, but that forum was exclusively worker's compensation.[13] Judge Sachs denied GSA's Motion to Dismiss finding that Workers Compensation was not the exclusive remedy

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13 Respondent filed a Motion to Dismiss the FTCA claims on the grounds that Petitioner's exclusive remedy for this type of claim for worker's compensation. That motion did not deny there was a remedy for the emotional distress claims raised in the FTCA claims as respondent's later Motion for Summary Judgment did.

for Petitioner's emotional distress claims and clearly implying that the FTCA provided a forum to raise those claims.

The language of the WPA does not limit Petitioner's remedies outside the MSPB. Respondent pointed to no language in the WPA which precludes Petitioner from pursuing a remedy for his emotional distress outside the MSPB and ignores the clear language of 5 U.S.C. Sec. 1222 which clearly permits other remedies to coexist with the Act. The WPA states in part:

> Sec. 1222. Availability of other remedies.
>
> Except as provided in Section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23.

This language makes it clear that Congress intended that "whistleblowers" were not to be denied other remedies outside the WPA.

There is no other meaning that can be ascribed to this language.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit, or, the Court may wish to summarily reverse the judgment for hearing by the trial court on the FTCA claim.

Respectfully submitted,

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Attorney for Petitioner

December 13, 1993

APPENDIX A

Order Denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc in the Eighth Circuit Court of Appeals

Dated: August 9, 1993

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 92-3210WMKC

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

Clarence B. Gergick,
Plaintiff - Appellant,

v.

Richard G. Austin, etc., et al.,
Defendants - Appellees

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

August 13, 1993

Order Entered at the Direction of the Court:

Michael E. Gans, Clerk
U.S. Court of Appeals, Eighth Circuit

APPENDIX B

Order of the United States Court of Appeals
for the Eighth Circuit affirming the District Court's grant of Summary Judgment

Dated: July 9, 1993

United States Court of Appeals
For the Eighth Circuit

No. 92-3210

Appeal from the U.S. District Court
For the Western District of Missouri

Clarence B. Gergick,

Plaintiff - Appellant,

v.

Richard G. Austin, Acting Administrator of the General Services Administration; United States of America,

Defendants-Appellees.

Submitted: April 14, 1993
Filed: July 9, 1993

Before JOHN R. GIBSON, LOKEN, AND HANSEN, Circuit Judges.

LOKEN, Circuit Judge.

Clarence B. Gergick is the Section Chief for Credit and Finance in the Accounts Receivables Branch of the General Services

Administration (GSA) in Kansas City. After a lengthy series of disputes with his supervisors, Gergick filed two claims for corrective action with the Merit Systems Protection Board under the Whistleblower Protection Act (WPA), 5 U.S.C. Sec. 1221(a). The MSPB ruled in Gergick's favor in both cases, and he was afforded significant relief, including back pay.

Gergick also commenced this damage action against the United States and GSA's Acting Administrator. Gergick alleged twenty acts of wrongful reprisal in violation of Title VII, 42 U.S.C. Sec. 2000e-16(a), claiming that his superiors were upset because he supported his subordinates' equal employment opportunity complaints. He further alleged ten violations of his rights under the Privacy Act of 1974, 5 U.S.C. Sec. 552a. Finally,

he sought damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. Subsection 1346(b), 2672, 2679, for the emotional distress his supervisors intentionally inflicted upon him when they retaliated for his whistleblowing activities. The district court[1] granted summary judgment dismissing Gergick's FTCA claims on the ground that the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in various sections of 5 U.S.C.), provides the exclusive remedies for these employment-related claims. Then, following a bench trial, the district court concluded in a thirty-seven page opinion that Gergick had failed to prove any violation of Title VII or the Privacy Act. Gergick appeals. We affirm.

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[1] The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri.

Gergick first argues that the district court erred in refusing to give collateral estoppel effect to findings of fact contained in two MSPB Initial Decisions on his WPA administrative claims. However, the presumption favoring application of collateral estoppel to final administrative decisions is "properly accorded sway only upon legislative default, applying where Congress has failed expressly or impliedly to evince any intention on the issue." Astoria Fed. Sav. & Loan Ass'n, v. Solimino, 111 S. Ct. 2166, 2170 (1991). Congress intended that claims arising under Title VII be afforded a trial de novo. See Chandler v. Roudebush, 425 U.S. 840, 863-864 (1976).[2] Consequently, the doctrine of

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[2] Gergick's contention that Title VII claimants were intended to be the sole beneficiaries of the right to trial de novo is simply wrong. See Kremer v. Chemical Constr. Corp., 456 U.S. 461, 474

administrative estoppel is inapplicable to Title VII claims. See University of Tenn. v. Elliott, 478 U.S. 788, 796 (1986).

Even if Title VII did not preclude the application of administrative estoppel, we agree with the district's court's conclusion that estoppel was not appropriate in this case. The issue in the administrative proceedings -- retaliation on account of whistleblowing -- was different from the issue at trial -- retaliation for EEO activities in violation of Title VII. The administrative findings Gergick would superimpose on this lawsuit concerned the period prior to enactment of WPA and thus were background in nature. In these circumstances, the district court did not err in electing to make its own findings on an appropriate trial record.

(1982).

Gergick next argues that the district court erred in ruling that his FTCA claims are precluded by the CSRA. In Premachandra v. United States, 739 F.2d 392, 394 (8th Cir. 1984), we held that the civil service laws provide the exclusive remedy for wrongful discharge from government employ, and therefore plaintiff's FTCA claim for mental anguish and other tort damages was precluded. The WPA was then enacted in 1989. In Rivera v. United States, 924 F.2d 948, 952 (9th Cir. 1991), the Ninth Circuit followed Premachandra and further held that the WPA "does not authorize government employees to bring FTCA claims based on conduct for which redress is available under the CSRA." We agree with the Ninth Circuit's thorough analysis of this issue. Gergick's attempt to distinguish Rivera on the ground that he is trying to supplement

rather than supplant the CSRA remedies is without merit. An exclusive remedial regime such as the CSRA may neither be supplemented nor replaced by other remedies. See, e.g., United States v. Demko, 385 U.S. 149, 152-53 (1966).

Gergick also argues that the district court should have allowed him to pursue FTCA damages for emotional distress as a supplement to his retaliation claim under Title VII. This contention too, is without merit. Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Serv. Admin., 425 U.S. 820, 835 (1976). Damages for emotional distress are not available under Title VII. See Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989, 992 & n.2 (8th Cir. 1984). The cases Gergick relies on -- University of Tenn. v. Elliott,

478 U.S. at 796, and Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1974) -- did not involve claims by federal employees.

Gergick's assertion that the district court erred in refusing to apply the Civil Rights Act of 1991 retroactively to his Title VII claims is foreclosed by our en banc decision in Hicks v. Brown Group, Inc., 982 F.2d 295, 299 (8th Cir. 1992), petition for cert. filed (Mar. 23, 1993).

Finally, Gergick argues that the district court's findings of fact leading to the rejection of his Title VII and Privacy Act claims are clearly erroneous. After carefully reviewing the record, we conclude that the record fully supports the district court's findings of fact, including its ultimate findings that Gergick failed to establish violation of Title VII or the Privacy Act. There was no clear error.

The judgment of the distrct court is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

Order of the District Court Granting Summary Judgment in Part to Defenadnt on Plaintiff's FTCA Claim

Dated: April 29, 1992

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Clarence B. Gergick,

Plaintiff,

v. No. 89-0838-CV-W-2

Richard Austin,
Administrator of the General
Services Administration,

Defendant.

ORDER

In the above titled action, plaintiff seeks a award of damages pursuant to Title VII, The Privacy Act, and the Federal Tort Claims Act. The primary thrust of Plaintiff's Complaint is the allegation that the General Services Administration, by and through it employees, agents and/or administrators, retaliated against him because of his whistleblowing activities and because of his actions related to fellow employees' EEO actions. Pending before the

court are cross motions for summary judgment. Specifically, plaintiff has moved for partial summary judgment arguing that factual findings made by the Merit Systems Protection Board should be binding on this court via collateral estoppel. In response, defendant moves for summary judgment as to the claims stated in Count III and Count IV of the plaintiff's complaint.

I. Standards for Summary Judgment

A movant is entitled to summary judgment pursuant to Fed. R. Civ. P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The moving party bears the burden of proof. Aetna Life Ins. Co. v. Great

National Corp., 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving all doubts as to the facts or existence of any material fact against the moving party. United States v. Conservation Chem., Co., 619 F. Supp. 162, 1979-80 (W.D. Mo. 1985).

Recently the Supreme Court has redefined the standards to be considered in ruling on summary judgment motions. In Anderson v. Liberty Loby, Inc., 477 U.S. 242 (1986), the Supreme Court discussed the two requirements of Rule 56(c), that there be (1) no genuine issue of (2) material fact:

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of this

> suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

477 U.S. at 248.

Further, "[i]n assessing whether a material fact is subject to a genuine dispute, a court should employ a standard essentially identical to that governing a motion for directed verdict under Rule 50(a)." Id. at 250. In Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Supreme Court emphasized that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" in order to establish a genuine issue of fact sufficient to warrant trial. Id. at 586. If a rational trier-of-fact, considering the record as a whole, could not find in favor of the non-moving party, then

a trial is unnecessary. Id.

II. Analysis

A. Count IV

Count IV of Plaintiff's First Amended Complaint is founded upon the Federal Tort Claims Act (hereafter FTCA), specifically 28 U.S.C. Section 1346(b), Section 2673 & Section 2679 (1988). The gist of plaintiff's claim in Count IV is that as a result of his "whistle-blowing" activities against GSA, he has been "subjected to intentional inflection of emotional distress by his supervisors, indirect supervisors and those who report directly or indirectly to them . . ." in the form of "extreme and outrageous conduct directed at Gergick." First Amended Complaint Paragraphs 28, 29. This purported retaliation has allegedly resulted in "severe emotional distress," weakened family relationships, physical pain

and suffering, and lost income and employment benefits. First Amended Complaint, Paragraph 31. On the basis of these alleged intentional actions and the resulting harm, plaintiff seeks a recovery in tort via the FTCA.

In two previous administrative actions, plaintiff presented identical allegations of retaliatory conduct by GSA employees to the Merit Systems Protection Board (hereafter MSPB.[1] On both occasions, the MSPB found in favor of plaintiff and held that GSA, through the actions of its employees, had retaliated against plaintiff in violation of the Civil Service Reform Act of 1978 (hereafter CSRA). In particular, the MSPB

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1 The Merit Systems Protection Board is the agency charged with, among other things, protecting the merit principles outlined in the Civil Service Reform Act of 1978. 5 U.S.C. Section 1204 (1988).

found that plaintiff had been retaliated against in violation of the Whistleblower Protection Act.[2] See attachments to Plaintiff's Motion for Partial Summary Judgment.

In finding for plaintiff, the MSPB provided plaintiff various remedies such as halting all personnel actions tainted by whistleblowing retaliation, totally purging plaintiff's files or personnel records of all unfavorable documents reflecting this

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2 In 1989, Congress passed the Whistleblowers Protection Act, 5 U.S.C. Section 1213, which sought to encourage federal employees to disclose evidence of "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. Section 1213(a) (1) (B) (Supp. 1990). Additionally, Congress added 5 U.S.C. Section 2302(b) (8) which made retaliation against federal whistleblowers a "prohibited personnel practice" actionable under the CSRA.

retaliation, issuing plaintiff a corrected performance rating reflecting a rating of "outstanding," and back pay with interest. These remedies flow directly from the enabling act defining the remedial powers of the MSPB. See 5 U.S.C.A. Section 1221 (Supp. 1990). However, in Count IV plaintiff pleads a tort action pursuant to the FTCA and seeks to recovery damages emanating from the emotional distress he allegedly suffered at the hands of defendants. Plaintiff argues that these damages would "supplement" the statutory remedies already provided by the MSPB. See Plaintiff's opposition to Defendant's Motion for Summary Judgment, p.4.

Defendant moves for summary judgment as to Count IV arguing that the remedies supplied to plaintiff by the MSPB for violations of the CSRA are exclusive. In

other words, the basic claim stated in Count IV entitles plaintiff to only those remedies available through the CSRA and already provided by the MSPB. Defendant argues that "Congress intended the provisions of the CSRA which make up the WPA to provide the exclusive remedy for federal employees who suffer retaliation as a result of whistleblowing." Defendant's Suggestions in Support of his Cross Motion for Summary Judgment, p. 8 (emphasis in original). Conversely, plaintiff argues that the CSRA remedies are not exclusive, but are in fact limited and cannot make plaintiff whole. Essentially, plaintiff "contends that CSRA has provided all the redress available under the CSRA and that CSRA provides no redress for the 'emotional distress' he suffered or other out of pocket expenses not covered by the 'costs' allowance of the WPA."

Plaintiff's Opposition to Defendant's Motion for Summary Judgment, p.4-5 (emphasis in original).

The precise issue presented by defendant's motion for summary judgment as to Count IV, whether the remedies available under the whistleblowing provisions of the CSRA are exclusive of remedies available under the FTCA, is one of first impression in the Eighth Circuit. However, this court finds Premachandra v. United States, 739 F.2d 392 (8th Cir. 1984), dispositive of the issue. In Premachandra, the Eighth Circuit was faced with a plaintiff who, having been wrongfully discharged from federal employment, successfully sought redress from the MSPB. The MSPB found that the federal employer "had been 'reckless or heedless' in terminating Premachandra [and therefore] reinstated him, and awarded full back pay

and seniority, together with $13,680.71 for payment of attorneys' fees." Id. at 393. Subsequent to the MSPB's findings and award, the plaintiff filed a civil suit under the FTCA. Plaintiff's FTCA claim sought additional damages for alleged mental anguish, and assorted costs and expenses, resulting from the federal employer's wrongful actions. Id. The District Court dismissed the action on the ground that the "civil service remedies available to wrongfully discharged federal employees under 5 U.S.C. Subsection 7511-7513, 7701-7703 were Premachandra's exclusive means of redress." Id.

The Eighth Circuit affirmed, holding that "Congress did intend the civil service laws to provide the sole remedy for federal employees in Premachandra's circumstances." Id. The fundamental issue presented and

resolved by the Court in Premachandra is the same fundamental issue presented by this action: Whether a federal employee who is subjected to a "prohibited personnel practice" actionable under the CSRA can seek a FTCA remedy which supplements a remedy received via the CSRA. Premachandra clearly answers this issue in the negative.[3] Further, Premachandra anticipates and rejects plaintiff's argument that "the CSRA

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In short, the civil service laws carefully prescribe how, when, and by whom the propriety of certain federal termination decisions will be reviewed. Had Congress intended for such decisions to be reviewable in district courts in the context of actions under the Federal Tort Claims Act, it would not have so precisely defined the civil service remedy." Premachandra v. United States, 739 F.2d at 394. The court acknowledges that the plaintiff's claim in Premachandra was based upon wrongful discharge and not retaliation for whistle-blowing. However, this distinction does not alter the relevance of Premachandra in resolving the current issue.

was clearly meant to deal with merit decisions on personnel actions such as promotions, reprimands, demotions, and firings" and not emotional harm flowing from these actions. See Plaintiff's Opposition to Defendant's Motion for Summary Judgment, p.3 (emphasis in original).

> Premachandra argues that the civil service laws were intended only to promote the efficient and fair conduct of federal personnel policy, and not to compensate employees for injuries caused by wrongful discharge. Doubtless Congress did intend to encourage fair and correct decisionmaking. However, the provision in the civil service laws for awards of back pay, attorneys' fees, accrued leave, and retroactive seniority go far beyond concerns for efficiency, and evidence an intent to compensate employees for harms flowing from arbitrary termination decisions . . . The fact that Premachandra might recover more were his tort action to proceed does not demonstrate that the civil service remedies were intended to be exclusive . . . We think instead that in enacting the civil service laws, Congress addressed the problem of wrongful termination decisions, and determined which consequential harms ought to be recompensed.

Premachandra v. United States, 739 F.2d at 394 (citations omitted). Significantly, the Ninth Circuit has faced the exact issue currently before this court and held that "[t]he Whistleblowers Protection Act of 1989 increases protection for whistleblowers, but it does so within the context of the CSRA. The Act does not authorize government employees to bring FTCA claims arising out of conducted addressed by the CSRA." Rivera v. United States, 924 F.2d 948, 954 (9th Cir. 1991).

Plaintiff also argues that 5 U.S.C.A Section 1222 (Supp 1990) manifests congressional intent that, within the context of whistleblower actions, the CSRA not be the exclusive remedy. Section 1222 states in relevant part:

> Except as provided in section 1221 (i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a

> provision of statute which is outside of both this chapter and chapter 23.

5 U.S.C.A. Section 1222 (Suppl. 1990). From this language plaintiff concludes that a FTCA claim is the only remaining remedy to plaintiff outside of the CSRA and thus should be allowed. The court in Rivera, relying on the legislative history of the Act, specifically rejected this argument:

> It is true that this provision admonishes courts against construing the CSRA "to limit any right or remedy available under" a statutory provision outside the CSRA. However, as we held above, at the time the Act came into effect, a suit under the FTCA was not an "available" remedy. The text of section 1222, standing alone, cannot support the (plaintiffs') argument that the Act has done more than preserve existing rights and remedies.

Rivera, 924 F.2d at 952 (parenthetical added). The proposition advanced by plaintiff in regards to Section 1222 simply does not survive scrutiny.

Plaintiff has failed to establish that

Count IV presents a FTCA claim capable of surviving summary judgment. Based upon Premachandra and Rivera, this court holds that plaintiff has no claims against the United States government under the FTCA. Accordingly, the court will grant defendant's motion for summary judgment as to Count IV.[4]

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Additionally, in his suggestions in support of the motion for partial summary judgment, plaintiff characterizes Count IV as seeking recovery under Title VII for emotional harm "suffered by plaintiff as a result of his . . . EEO activity." The court finds summary judgment appropriate to this claim. Title VII is the "exclusive remedy for claims of discrimination in federal employment." Brown v. General Services Administration, 425 U.S. 820 835 (1976). To the extent the claim stated in Count IV arises from discrimination against plaintiff on account of his EEO activity, the court finds that such a claims must be made under Title VII. However, this court has held that Title VII does not permit claims for emotional distress. Hybki v. Alexander & Alexander, Inc., 536 F. Supp. 483, 485 (W.D. Mo. 1981). Therefore any claims in Count IV for emotional distress arising from EEO violations cannot be

B. Count III

Count III is based upon alleged violations of Sec. 3 of the Privacy Act. 5 U.S.C. Sec. 552a (1988). Defendant moves for summary judgment arguing that the CSRA preempts all Privacy Act claims stated in Count III. Alternatively, defendant claims that certain claims stated in Count III should be dismissed for failure to exhaust administrative remedies.

In support of his first argument, defendant cites Kleiman v. United States Dept. of Energy, 742 F.Supp. 697 (D.D.C. 1990), aff'd, 956 F.2d 335 (D.C. Cir. 1992), for the proposition that "[t]he Privacy Act is not a vehicle for securing judicial review of federal personnel decisions, nor is it a springboard for launching a

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substantive and will be subject to summary judgment.

collateral attack on those decisions." Id. at 699. this court does not take issue with that conclusion, but finds it inapplicable. In Kleiman, the plaintiff brought suit in district court via the Privacy Act challenging the job descriptions listed in his personnel files. The court found plaintiff's claim was, at its core, a challenge to a personnel decision. "When an individual challenges an agency's personnel action, the challenge falls under the CSRA, not the Privacy Act." Id. In this case, however, plaintiff is not challenging a personnel action as that term is defined in 5 U.S.C. Sec. 2302(a)(2). His complaint alleges various facts and actions independent of personnel actions that ostensibly support a claim under the Privacy Act. Thus, defendant's categorical attack on Count III is without merit and will be

denied.

Alternatively, defendant states that some of the specific claims stated in Count III should be dismissed for failure to exhaust available administrative remedies. A number of plaintiff's claims are based either upon 5 U.S.C. Sec. 552a(g)(1)(A), which provides a civil remedy for an agency's determination not to amend an individual's records pursuant to a request under Sec. 552a(d)(3), or 5 U.S.C. Sec. 552a(g)(1)(N), which provides a civil remedy for an agency's refusal to grant an individual access to his or her records pursuant to a request under Sec. 552a(d)(1). A civil remedy under Sec. 552a(g)(1)(A) or (B) implicitly requires that the plaintiff at least allege that he has made a request via Sec. 552a(d)(1) or Sec. 552a(d)(3). Further, for plaintiff to state a viable

claim under Sec. 552a(g)(1)(A), he must at least allege that he has exhausted the administrative procedures created in Sec. 552a(d)(3). See Hill v. U.S. Air Force, 795 F.2d 1067, 1069 (D.C. Cir. 1986). A review of plaintiff's complaint reveals a lack of any allegations meeting the request and exhaustion requirements of Sec. 552a(g)(1)(A) and (B).[5] Indeed, in his suggestions plaintiff admits "failure to exhaust in strict compliance with the Code of Federal Regulations on these two issues." Plaintiff's Opposition to Defendant's Motion for Summary Judgment, p. 12. Accordingly,

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GSA has promulgated regulations outlining the procedure to request access or amendments to records. See 41 C.F.R. Sec. 105-64.301-1 (1990); 41 C.F.R. Sec. 105-64.101 (1990). Plaintiff has failed to establish compliance with these regulations and therefore fails to state a claim capable of surviving summary judgment.

the court finds that summary judgment is appropriate as to all claims arising out of 5 U.S.C. Sec. 552a(g)(1)(A) and (B).

Count III also states claims arising out of 5 U.S.C. Sec. 552a(g)(1)(C) and (D). Unlike Sec. 552a(g)(1)(A) and (B), actions pursuant to Sec. 552a(g)(1)(C) and (D) are not predicated upon a request by plaintiff and exhaustion of administrative remedies. The court cannot say as a matter of law that plaintiff has failed to present a genuine issue concerning the material fact supporting claims under Sec. 552a(g)(1)(C) and (D). Therefore, summary judgment is not warranted as to these claims and will therefore be denied.

c. Collateral Estoppel

Plaintiff seeks to evoke the doctrine of collateral estoppel as to factual determinations made by the MSPB in two

previous actions. Specifically, plaintiff argues that defendant should be collaterally estopped from relitigating factual determinations that plaintiff was retaliated against by defendants for his whistleblowing activities and EEO activities. The United States Supreme Court has made it clear that decisions from administrative agencies can by (sic) the source of issue preclusion in federal district courts. See University of Tennessee v. Elliott, 478 U.S. 788, 796-99 (1986). In this case, however, the court finds that plaintiff has failed to met (sic) the traditional test required for the assertion of collateral estoppel.

In Johnson v. Miera, 926 F.2d 741 (8th Cir. 1991), the Eighth Circuit reiterated the traditional test governing the application of collateral estoppel:

> "It is well settled under the collateral estoppel doctrine that

> four elements must exist to bar relitigation of a factual issue in a subsequent proceeding:
>
> (1) the issue sought to be precluded must be the same as that involved in the prior action;
>
> (2) the issue must have been litigated in the prior action;
>
> (3) the issue must have been determined by a valid and final judgment; and
>
> (4) the determination must have been essential to the prior judgment.

Id. at 743. The issue before the MSPB in both of the previous administrative actions was whether plaintiff had been retaliated against on the basis of his whistleblowing activities, as defined by 5 U.S.C.A. Sec. 2302(b)(8) (Supp. 1990). Admittedly, there is some uncertainty as to whether the MSPB considered plaintiff's involvement in other GSA employees' EEO actions to be whistleblowing. However, the December 4, 1991, decision and order of the MSPB rejects the argument that plaintiff was engaged in

whistleblowing by participating in the EEO activities of fellow workers. See Decision and Order of MSPB, December 4, 1991, p. 31-32. Plaintiff argues that the June 7, 1990, MSPB decision and order held that plaintiff's involvement in other GSA employees' EEO actions was whistleblowing. A review of this decision and order, however, reveals that, at best, it is ambiguous as to whether the ALJ considered these activities as whistleblowing.

Plaintiff carries the burden of proving that all four elements necessary for evoking collateral estoppel exist. Johnson v. Miera, 926 F.2d at 743. The court finds that plaintiff has failed to prove a fundamental requirement for the application of collateral estoppel; that "the issue sought to be precluded [is] the same as that involved in the prior action." Id. Count I

and Count II of plaintiff';s First Amended Complaint present issues involving alleged retaliation/discrimination in violation of Title VII. The issue before the MSPB in the prior actions was whether plaintiff had been retaliated in violation of the WPA. The court acknowledges that plaintiff has demonstrated some similarities between these issues. But to properly assert the doctrine of collateral estoppel the plaintiff must do more that (sic) show vague similarities. Instead, there must be an affirmative showing of complete identify between the issues. Lacking such a showing the court must deny plaintiff (sic) motion for partial summary judgment.[6]

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6 Similarly, the court finds that there is no relationship between the issues presented by Count III, the Privacy Act claims, and the issue already litigated by the MSPB. Therefore collateral estoppel is not available to plaitniff in making a case for Count III.

III. Conclusion

Therefore, it is ORDERED THAT:

(1) Plaintiff's Motion for Partial summary judgment is DENIED; and

(2) Defendant's Motion for summary judgment is GRANTED in part and DENIED in part:

(a) The motion is GRANTED as to Count IV and any claims, stated in Count III, arising from 5 U.S.C. Sec. 552a(g)(1)(A) or (B); but

(b) The motion is DENIED as to any claims, stated in Count III, arising from 5 U.S.C. Sec. 552a(g)(1)(C) or (D).

Fernando J. Gaitan, Jr.
United States District Judge

Dated: April 29, 1992
Kansas City, Missouri